responsibility and courts should not allow themselves to be misled into applying this section by any misplaced sense of leniency or sympathy. The public must not be led to suppose that any offender may commit any crime without any fear of punishment. If there are circumstances which indicate that the accused had succumbed to a sudden temptation, or the offence committed by him was committed only as a result of a sudden uncontrollable impulse, or it was the result of sheer thoughtlessness, it may afford some reason to exercise discretion under section 173A. These are quite a few of the considerations which may be taken into account. The list can never be exhaustive. There may be innumerable situations and circumstances depending on the facts of a particular case and it is upon those circumstances that the court should exercise its proper judgment.

I am of the view that action cannot be taken under section 173A on the ground of the age of the offender alone unless there is placed on the record material to show that by reason of the character, antecedents and the circumstances under which the accused committed the offence, it was expedient to act under that section. There is no such record in this particular case and the age of the accused is also not one where the court could be favourably inclined to exercise its discretion either under section 173A or section 294 of the Criminal Procedure Code, as he is 36 years of age. A person may be led astray or inadvertently act under an evil influence. That may be a case in which the powers under section 173A of the Criminal Procedure Code may be invoked. There is nothing of that sort in this case. From a plain reading of section 173A of the Criminal Procedure Code I find that the intention of the legislature in inserting that provision was to indicate the lines on which the discretion of the court should be exercised. It was not meant, in my view, to be applied indiscriminately to all first offenders. An offence under section 448 of the Penal Code is not an offence of a trivial nature and the circumstances under which the accused committed it in this case do not at all warrant the exercise of any discretion in his favour.

The order I propose to make in this case is that the order of the learned magistrate be set aside and the case be sent back for retrial before another magistrate. The accused will appear before the magistrate at Batu Pahat on the 2nd November, 1970 when the case will come up for mention. He is allowed bail in the sum of $300 with one surety.

Retrial ordered.

Solicitors: *T. Thalayasingam & Co.*

YUSOFF BIN SIDIN v. PUBLIC PROSECUTOR

[A.Cr.J. (Sharma J.) October 27. 1970]

[Muar — Criminal Appeal No. 19 of 1970]

Criminal Law and Procedure — Statements — Cross-examination of witness of previous statements — Criminal Procedure Code (Cap. 6) s. 113(ii) — Evidence Ordinance, 1950, s. 145(1).

The only way in which a previous statement of a witness can be used is by contradicting the witness by such writing and this can be only by drawing his attention to such parts of the recorded statement as are intended to be used for the purpose of contradiction and allowing him an opportunity to explain any contradiction. Those parts of the statement which are used for contradicting the witness must be proved and brought on the record.

If the procedure prescribed by section 145 of the Evidence Ordinance is not adopted and the witness's attention is not drawn to the written record, it cannot be used as evidence.

Cases referred to:-

(1) *Chung Khiaw Bank Ltd.* v. *Public Prosecutor* [1968] 2 M.L.J. 196, F.C.

(2) *How Kee Kiat* v. *Collector of Land Revenue* [1913] 1 F.M.S.L.R. 105 at p. 110.

CRIMINAL APPEAL.

T. K. Lim for the appellant.

Ahmad Fairuz bin Dato Sheikh Abdul Halim (Deputy Public Prosecutor) for the respondent.

Sharma J. (delivering oral judgment): This appeal has been withdrawn and is consequently struck out but there arises a point of some importance in this appeal which concerns the way in which the credit of a witness is required to be impeached under section 113(ii) of the Criminal Procedure Code. Under section 113(ii) of the Criminal Procedure Code the word "may" when it relates to procedure means "must". This was so stated by McIntyre F.J. in the case of *Chung Khiaw Bank Ltd.* v. *Public Prosecutor*(1) quoting the case of *How Kee Kiat* v. *The Collector of Land Revenue.*(2)

The credit of a witness under section 113(ii) of the Criminal Procedure Code can thus only be impeached in the manner provided by the Evidence Ordinance, *i.e.* as provided under section 145(1) of the Evidence Ordinance, which reads as follows:

"A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question in the suit or proceeding in which he is cross-examined, without such writing being shown to him or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

A prosecution or defence witness cannot be merely asked whether he made a previous statement to the contrary to the investigating officer and the matter left there. That answer of the witness cannot be used as evidence. The only way in which the previous statement can be used is *by contradicting the witness by such writing* and this can be only by drawing his attention to such parts of the recorded statement as are intended to be used for the purpose of contradiction and allowing him an opportunity to explain any contradition. Those parts of the statement which are used for contradicting the witness must be *proved and brought on the record.* Where, however, there is no direct contradiction between what is said to the police and what is said in court and the contradiction consists only in an omission, the said omission can be proved by bringing on record the whole of the statement given in court. Further, the statement of a witness cannot be used in court for the purpose of determining the weight to be attached to the testimony of the witness unless it has been proved by either the

prosecution or the defence in accordance with the provisions of section 113(ii). If the procedure prescribed under section 145 of the Evidence Ordinance is not adopted and the witness's attention is not drawn to the written record, it cannot be used as evidence and the police officer cannot be asked about it. Cross-examination of the witness must be confined to the contradiction between the two statements and only those portions of the statements as have been used to contradict the witness should form part of the judicial record. Other parts of the statement cannot be relied upon by either the prosecution or the defence in determining the guilt or innocence of the accused and should not be relied upon by the court.

Solicitors: *T. K. Lim & Co.*

PUBLIC PROSECUTOR v. YEO KIM BOK

[O.Cr.J. (Sharma J.) October 31, 1970]

[Muar — Criminal Trial No. 3 of 1970]

Penal Code, s. 102 — Extent of right of private defence — Continuance of — Onus on party setting up the right of self defence — Submission of no case to meet.

The accused in this case was charged for having committed culpable homicide not amounting to murder by causing the death of one Lee Peak on January 28, 1970 at 8.30 p.m. with the knowledge that the act committed by him was likely to cause the death of the deceased. At the end of the prosecution case defence counsel submitted that there was no case for the accused to meet. It was clear from the prosecution evidence that the deceased and the accused had prior to the incident some money dealings and that the deceased had lent some money to the accused and had demanded its repayment. This was when he found the accused in a coffee shop, the deceased demanded repayment of the loan in a very aggressive manner and on seeing the accused remaining calm and passive went to pick up a knife when the accused was possibly going out of the shop through its rear door. After having picked up the knife the deceased rushed towards the accused who had no way to escape. Finding himself in that desperate situation the accused turned back, picked up a wooden ladle and with it hit the knife which was held by the deceased. As a result of this the knife fell on the ground and both the accused and the deceased started to grapple with each other and fell down rolling on the ground endeavouring to pick up the knife which had fallen from the hand of the deceased. This struggle lasted for a short while after which a witness saw an object in the hand of the accused. This object looked like a knife. The accused remained pinned under the deceased most of the time except on one occasion. According to the evidence the deceased was a man of better build and strength than the accused. There was no doubt that it was the act of the accused which caused the death of the deceased. The questions which had to be decided were whether the defence had established the right of self defence, and whether there was continuing danger and a reasonable apprehension of such danger.

Held: (1) there was a reasonable apprehension of danger to the life of the accused when the deceased rushed at him with the knife in his hand and at that stage he had the right of private defence which extended even to the killing of the deceased;

(2) in the light of the evidence produced by the prosecution there was a reasonable possibility, nay probability, that if the deceased had himself managed to get hold of the knife, he would have struck some blows with the knife on the accused. In the circumstances and in the situation in which the accused found himself there was bound to be in his mind a reasonable apprehension of death or grievous hurt being caused to him by the deceased unless he got out of the reach of the deceased;

(3) the defence has through the prosecution witnesses proved that the accused was acting in his right of private defence. It is reasonable to suppose that the accused thought in the critical situation in which he was that the deceased might wrest the knife from his hand and use it against him. The reasonable apprehension of death at the hands of the deceased could not thus be said to have left the mind of the accused. In the circumstances there was no case to meet.

CRIMINAL TRIAL.

Ahmad Fairuz bin Dato Sheik Abdul Halim (Deputy Public Prosecutor) for the prosecution.

Elyas Majeed for the accused.

Sharma J. (delivering oral judgment): The accused in this case has been charged for having committed culpable homicide not amounting to murder by causing the death of one Lee Peak on the 28th January, 1970 at 8.30 p.m. with the knowledge that the act committed by him was likely to cause the death of the said Lee Peak.

At the end of the prosecution case the defence counsel has submitted that there is no case for the accused to meet. It seems clear from the prosecution evidence that the deceased and the accused had prior to the incident some money dealings and that the deceased had lent some money to the accused and had demanded its repayment. This was when he found the accused in the coffee shop at premises No. 34 Jalan Abdullah, Buloh Kasap, Segamat. According to P.W. 4, who was at the relevant time an assistant in the said coffee shop, the deceased demanded repayment of the loan in a very aggressive manner and on seeing the accused remaining calm and passive went to pick up the knife (Exhibit P5) when the accused was possibly going out of the shop through its rear door. After having picked up the knife the deceased rushed towards the accused who, according to P.W. 4, had no way to escape. Finding himself in that desperate situation the accused turned back, picked up a wooden ladle and with it hit the knife which was held by the deceased. As a result of this the knife fell on the ground and both the accused and the deceased started to grapple with each other and fell down rolling on the ground endeavouring to pick up the knife which had fallen from the hand of the deceased. This struggle lasted for a short while after which P.W. 4 saw an object in the hand of the accused. This object looked like a knife. The accused remained pinned under the deceased most of the time except on one occasion. According to the evidence the deceased was a man of better build and strength than the accused. I have no doubt in my mind that it was the act of the accused which caused the death of the deceased. The only question which I have to decide at this stage is whether the defence has established the right of self defence. There is a conflict of testimony between P.W. 4 and P.W. 5. P.W. 5 was in the coffee shop only for a few seconds. When he came into the coffee shop he saw the accused and the deceased struggling in a standing position and the accused holding a knife in his hand. He thereupon ran out of the shop to make a report at the police station. This testimony is in conflict with the testi-